No.

IN THE

Supreme Court of the United States

MARTIN CHAMBERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the harsh, unique, and severely criticized "initial brief" rule of the Eleventh Circuit, which bars consideration of any issue not raised in an appellant's initial brief, deprived petitioner, and many other similarly situated criminal appellants, of due process of law, and their right to raise the illegality of their sentence under *United States v. Booker*, 543 U.S. ___ (2005), because both *Booker* and *Blakely v. Washington*, 542 U.S. ___ (2004) were decided *after* the filing of the Opening Brief?

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PETITION FOR WRIT OF CERTIORARI

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This is a Petition for Writ of Certiorari brought to review the unpublished Memorandum of the United States Court of Appeals for the Eleventh Circuit filed June 24, 2005, which affirmed Petitioner's conviction for violation of Title 18 U.S.C. §§1956(h) and 1956(a)(3)(B), and refused to consider Petitioner's claims of error under *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531 (2004) and *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738 (2005).

Chambers' initial brief was filed April 14, 2004, approximately two months before this Court's decision in *Blakely*. Petitioner made timely and repeated efforts to have the illegality of his sentence under *Blakely* considered by the court, all of which were rejected by the Eleventh Circuit. Following this Court's decision in *Booker*, Petitioner sought relief under the provisions of that case. In each instance, the Eleventh Circuit refused to consider these issues because of its unique, harsh, and severely criticized "initial brief" rule which forecloses consideration of any issue not raised in the Appellant's Opening Brief. See *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004) (per curiam), and footnote 1, *infra*.

This rule denies Petitioner, and others similarly situated, due process of law, and creates a very deep and severe conflict in the Circuits.

SUMMARY OF JURISDICTION

The unpublished Memorandum Opinion of the United States Court or Appeals for the Eleventh Circuit was filed June 24, 2005. [Appendix A]. A timely Petition for Rehearing and Petition for Rehearing En Banc was denied August 9, 2005 [Appendix B].

Jurisdiction is appropriate under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SUMMARY OF ARGUMENT

This Petition raises substantial issues concerning the denial of access to the benefits of *United States v. Booker*, *supra*, to a number of appellants, such as Martin Chambers, whose Opening Briefs were filed before this Court's decision in *Blakely v. Washington*, *supra*, because of the Eleventh Circuit's unique, unconstitutional, and criticized "initial brief" rule.[1] Pursuant to this rule, an issue not raised in an appellant's Opening Brief will not be considered by the court, despite the fact that the authority upon which it is based did not exist at the time that the Opening Brief was filed.

This incredibly harsh rule is imposed in *Blakely/Booker* cases, despite the Eleventh Circuit's candid recognition that contrary precedent nationwide held before *Blakely* that the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) did not apply to cases such as this:

> "This omission [of an *Apprendi* argument] is certainly understandable in that neither *Blakely* nor *Booker* had been decided, and then-controlling circuit precedent held that the Sixth Amendment right to a trial by jury, as explicated in *Apprendi*, 'ha[d] no application to, or effect on, . . . Sentencing Guidelines calculations, when . . . the ultimate sentence imposed does not exceed

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[1] See *United States v. Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005); *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004), *Rehearing En Banc denied*, 391 F.3d 1327 (11th Cir. 2004), *vacated by* __ U.S. __, 125 S.Ct. 2542 (2005), *reinstated by* __ F.3d __, 2005 W.L. 1620719 (11th Cir., June 12, 2005); and *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001).

> the prescribed statutory maximum penalty,' *United States v. Sanchez*, 269 F.3d 1250, 1288 (11th Cir. 2001) (*en banc*)." *United States v. Vanorden*, __ F.3d __, No. 03-11083 (11th Cir., June 30, 2005), at footnote 1.

The application of this rule, particularly as applied to *Booker* claims, has come under severe attack *even within the Eleventh Circuit.*

> "Based upon the doctrine of *stare decisis*, I am convinced that our court is correct in holding that the Bordons cannot now bring *Booker* to our attention. *The Bordons should have claimed relief under Booker -- before Booker was decided*!
>
> "For this precedent I am sorry. I confess that this feeling has long and deep roots. See *McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1498-1501 (11th Cir. 1990) (Hill, J., dissenting). In *McGinnis*, I probably said all that I needed to say on this subject. I won't repeat it here. *Id.*" *United States v. Borden*, __ F.3d __, No. 04-10654 (11th Cir., August 25, 2005), Hill, Circuit Judge, concurring.
>
> "This is a strange rule we have: in a case in which the Supreme Court has vacated our decision for 'further consideration in light of [*Booker*]' precisely *because* we did not have the benefit of *Booker* when we rendered our first decision, we declined to